IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

MISC. CIVIL APPLICATION No. 771 OF 2006
IN
APPEAL AGAINST ORDER No. 48 OF 2002.

Sou. Jethibai Shrikisan Chhangani. ....PETITIONER

VERSUS

1.Sharad Govindrao Sarnaik
and another. ....RESPONDENTS

Mr. M.G.Bhangde, Senior Advocate with
Advocate V.V. Bhangde Advocate, for Review Applicant
Mr. A.V. Khare, Advocate non-applicants.

CORAM : B.P. DHARMADHIKARI, J.

Date of reserving the Order. - 22.09.2006.
Date of Pronouncement. - 28.09.2006.

O R D E R.

1. Review applicant in this proceeding is the original Plaintiff.

She filed Regular Civil Suit 91/1997 for declaration and injunction against present non-applicants i.e. appellants in A.O. 48/2002 for declaration and injunction in relation to plots involved in the Suit and asserted that she is owner of those plots. The Defendants (present non-applicants) opposed that Suit and claimed ownership and possession with themselves. 8th Joint Civil Judge (junior division), Amravati decreed that Suit in favour of present applicant on 7/7/1999. The defendants then filed Regular Civil Appeal 163/1999 under section 96 of CPC and Joint District Judge, Amravati vide judgment dated 6/7/2002 was pleased to allow it and remand the matter back to trial court for fresh decision by giving parties opportunity to lead evidence and to amend pleadings. The defendants challenged this remand in A. O. 48/2002 and after hearing respective Counsel it was allowed by me and the judgment on decree delivered by trial court was quashed and set aside on 16/12/2005. The plaintiff has thereafter filed this Review application. There was delay of about 35 days in preferring Review and the same has been condoned on 17th July 2006 by me.

2. Senior Advocate M.G. Bhangde with Advocate V.V. Bhangde argued for original plaintiff/Review applicant while Advocate A.V. Khare argued for original defendants/present non-applicants. Non consideration of C.A. 7773 of 2002 is the basis for seeking review. However, it is apparent that it erroneously mentions that it is under O. 41 R. 27 CPC though in effect it is in the nature of cross-objection under O.41 R.22. The non-applicants also have understood it to be under O.41 R. 22 & have not questioned its tenability. Application in fact at its end points out that it is filed within 30 days of service of summons of A.O. upon respondent/plaintiff.

3. Learned Senior Advocate has contended that when A. O. was heard by this court on 16/12/2005, its attention was not invited to Civil Application No. 7773/2002 filed by plaintiff under Order 41 Rule 22 of CPC. By said Civil application a prayer was made to dismiss Regular Civil Appeal and to uphold judgment and decree in Regular Civil Suit

91/97 by pointing out that order of remand was perverse and unwarranted. It was stated that as per orders of this court dated 21/1/2003, said Civil application was to be considered at the time of final hearing of A. O. and as on 16/12/2005, this Civil Application was not pointed out to this court, the same has remained undecided and hence, there is an error apparent calling for review of judgment dated 16/12/2005. It was stated that the defendants in Suit who were appellants in said A. O. were seeking dismissal of Suit itself pointing out that remand only permitted plaintiff to fill in lacunae while vide Civil Application No. 7773/2002 the present applicant/original plaintiff also had challenged remand pointing out that view taken by trial court in her favour deserved no interference in Regular Civil Appeal. Learned senior advocate also stated that as the Review is being sought, M.C.A. is placed before this court (same Judge) as per procedure and if this court is satisfied that case for review is made out, it has to recall its judgment dated 16/12/2005 and direct the office/registry to list A. O. before appropriate Bench taking up the same as per roaster

assignment. However, the Senior Advocate also made it clear that this was only a submission, and he was not desirous of substantiating it and was ready and willing to argue the matter on merits also. Accordingly, he argued the case on merits also and contended that sale deed in favour of plaintiff has been admitted by defendants and description of property sold with its area and boundaries was never disputed by them. He argues that the map of layout prepared in the land purchased by plaintiff has also been produced before trial court as Exhibit 30 and the defendants have not disputed said map. He points out that by sale deed dated 7th April 1983, predecessor in title of defendants sold property to vendor of plaintiff and on same day, plaintiff purchased very same property from said vendor Shri Malu. Exhibit 27 and 28 are the respective sale deeds and the plaintiff accordingly proved her title and possession. He argues that the act of defendants of erecting a fencing around the property purchased by plaintiff was thus shown to be illegal and trial court has correctly appreciated this position. He therefore prayed for setting aside of the order of Appellate court and to

restore judgment and decree of trial court in favour of plaintiff.

4. Advocate Shri Khare for original defendants has contended that the trial court did not ascertain the area not sold by predecessor in title to Shri Malu and hence, exact area or portion sold by Shri Malu to plaintiff. He argues that unless and until, identity of property purchased by plaintiff is established, relief could not have been given. It is argued that fencing put by defendants was around their property only which was retained by their predecessor and was excluded expressly from sale deeds exhibit 27 and 28. According to learned Advocate, plaintiff did not get title to the property which was fenced by present defendants and in any case, she could not prove such title or possession. The burden was upon plaintiff and her failure to discharge it resulted in an order of remand by First Appellate Court which has been rightly interfered with by this court in its judgment dated 16/12/2005. He argues that lower appellate court had unduly permitted plaintiff opportunity to correct errors and to fill in lacunae which is

contrary to settled law. According to him, this court has to consider the effect of challenge in Civil Application No. 7773/2003 on its judgment dated 16/12/2005 and power of review can be exercised only if this court finds that said judgment is unsustainable or vitiated. He states that present M.C.A. filed by applicants (original plaintiffs) cannot be treated as application limited to or for recall of judgment. He states that view taken by this court in its judgment dated 16/12/2005 needs no change and the Review therefore deserves to be dismissed.

5. From the facts and arguments stated above, it is more than apparent that the judgment of lower appellate court dated 6/7/2002 was in challenge before this court at the instance of defendants as also plaintiff. The defendants contended that by remanding matter back, Lower Appellate Court unnecessarily granted one more opportunity to original plaintiff to fill in errors in pleading or evidence and to rectify mistakes committed during trial of Suit. They contended that if Appellate Court found that there was no sufficient material on record,

it ought to have dismissed the Suit instead of asking plaintiff to play such material on record. The plaintiff vide her application under Order 41 Rule 27 CPC also contended that remand was totally unnecessary because material already on record appreciated by Trial Court was sufficient to substantiate her grievance and to support the relief in her favour. This Court decided A. O. on 16/12/2005 without any knowledge of her application under Order 41 Rule 22 and therefore, with the impression that original plaintiff had acquiesced in appellate judgment of remand to trial court. Even the learned advocate representing plaintiff has argued in ignorance of Civil Application 7773/2003. Thus, the errors or mistakes committed by lower appellate court by ignoring or misconstruing any material in favour of plaintiff were neither pointed out to this court nor were relevant in that hearing. One of the arguments of plaintiff at that time was that this court could not have dismissed the Suit in A. O. and if this court felt that lower appellate Court was wrong in remanding the matter, this court should ask lower appellate court to re-hear the Appeal and to pass appropriate order on

merits as otherwise statutory right of filing Second Appeal would be denied to plaintiff. It is clear that when plaintiff is also assailing said remand with contention that she has discharged the burden in Civil Suit itself, the entire controversy needs to be looked into from different perspective. However, if scrutiny from such different perspective does not make any change in final outcome and the judgment dated 16/12/2005 is required to be maintained, the Review will be required to be rejected. Review is examining again the judgment dated 16/12/2005 in the light of circumstances placed before this court latter on and it is not only a limited scrutiny to find out whether A. O. needs to be re-heard. Such limited scrutiny to find out necessity of rehearing is not review. Review necessarily contemplates taking of a different view on merits of controversy.

6. In fact this court in judgment dated 16/12/2005 has found that lower appellate court in paragraph 21 of its judgment recorded that plaintiff could not establish her ownership and in paragraph 21

recorded that she could not prove her possession. It also found that plaintiff did not prove that defendants unlawfully obstructed her possession. Then the observations of appellate court about the absence of proper evidence before trial court at the instance of plaintiff in paragraph 23 of judgment are also reproduced by me and thereafter it has been observed by me that after recording unequivocal finding, the lower appellate court has permitted her to adduce evidence only with desire that truth should come on record. It is also observed by me that it was not the duty of appellate court to assist her in this respect or to point out errors or mistakes committed by her and to give opportunity to cure the same. It is also recorded by me that truth in relation to title, possession and alleged effort to dispossess has come on record already. Thus, entire application of mind is presuming that there is no challenge to any of these findings of lower appellate court by plaintiff. Now, in view of existence of application under Order 41 Rule 22 on record filed by plaintiff, it is clear that the conclusions reached by me as above need reconsideration in the light of arguments advanced as

above.

7. Late Shri Govindrao Sarnaik, is the predecessor entitle of defendants. Defendant number one Sharad is his son while defendants of two Shashank is his grandson. Govindrao Sarnaik had on 7/4/1983 sold two acres or .81 R from fill a survey No 57/2 to Shri Malu. This purchaser has thereafter on same day sold very same land to present plaintiff. Both the sale deeds are exhibit 27 and exhibit 28 on record & defendants have not disputed execution of these sale deeds. They have also not challenged the same. The dispute is only in relation to extent of property sold. Perusal of judgment of trial court reveals that deceased Govindrao Sarnaik was an eminent lawyer of Amraoti. There is no dispute about the description of property sold. On the contrary the defendants in evidence admitted that deceased sold two acres (0.81R) excluding land of temple and well and house to Shri Malu. The land sold is described in sale deeds as under: --

Both sale deeds mention that total area of survey No 57/2 is 2 Hector

24R and out of it portion as specified below is sold.

<u>Description in Exhibit 27</u>-- from Late Shri Govindrao Sarnaik to Shri Malu: -- 2 acres or .81 R land with trees shrubs etc. on Eastern side of North-South bund with boundaries ---- on East -- 10 feet wide road left by owner for egrace and ingrace to temple and well adjacent to Bund or dhura, land sold by Tekade, on West-- Field belonging to Varsha Traders, on North-- Land sold by Babarao Navale and on South-- Government road from Shegaon to Nawasari.

<u>Description in Exhibit 28</u>----- from Shri Malu to Plaintiff: -- 2 acres or . 81 R land with trees shrubs etc. on Eastern side of North-South bund, after excluding land of temple and well constructed by Sarnaik, two acres complete. Shri Sarnaik has left 10 feet wide road for going to Maroti temple and well by the side of South North dhura (bund). Two acres of land after excluding land of temple and well is sold to you. Its boundaries: -- on East -- 10 feet wide road left by owner for egrace and ingrace to temple and well adjacent to Bund or dhura, field of Shrikisan Chhangani, on West-- Land belonging to Varsha Traders, on South-- Government road from Shegaon to Nawasari and on North-- Field of Dhanaraj Chhangani.

Both the sale deeds also mention that possession is handed over to respective purchaser on same day immediately. Thus, what is conspicuous in both these documents is sale of 2 acres excluding certain portion by deceased Govindrao Sarnaik. Area of portion retained by deceased is nowhere specified. In this respect, when the defendant's defence is looked into, they have only taken plea of denial. They have denied ownership of plaintiff and also description of portion sold and its boundaries. They contended that entire area is adjacent to temple only and it was fenced by deceased Govindrao Sarnaik and it is in their continuous and peaceful possession. However, in evidence the execution of sale deeds excluding the temple/well portion is admitted by them. It is apparent that the temple and well were landlocked and hence deceased was required to reserve a road 10 feet in width from South North bund. If lands of temple extended up to government road from Shegaon to Nawasari on Southside, it was not necessary for deceased to make such arrangement. The plaintiff has after purchasing

the land converted it to nonagricultural purpose and got a layout sanctioned in it. The said layout map is at exhibit 30 and it is sanctioned in May 1996. It also shows area of temple within the layout and said area can be approached by 3 m wide road which is shown on its Eastern side on South North Bund and connects temple to government road proceeding from Shegaon to Nawasari and located on southern side of the layout. As the boundaries are not in dispute, the area covered by those boundaries is definitely sold by deceased Govindrao to Shri Malu and it then came to present plaintiff. Considering the defence in written statement and the position emerging on record, it is apparent that plaintiffs are entitled to 2 acres or 0.81R of land within boundaries mentioned in sale deed and defendants have not shown that plaintiffs have violated those boundaries in any way. The defendants have also not stated that land sold by sale deed is not suit land or is not mentioned in layout map. Thus there is no question of confusion of identity of land also. The area of temple and well excluded from sale deed is not specified but that was

not the subject matter of suit. The act of erecting a fencing at the boundaries mentioned in sale deeds above i.e. fencing the property purchased by plaintiff gave rise to filing of suit and material on record is sufficient to hold that defendants could not have erected any such fencing.

8. In this background, when application of mind by trial court is perused, it has correctly found that the defendants could not challenge correctness of genuineness of map at exhibit 30. It has found that the sale as also boundaries mentioned in the sale deed were admitted by defendants. It has thereafter considered the location of portion reserved by deceased Govindrao for temple/well and also other evidence on record. Estate broker Shri Kadu (PW-3) has proved erection of fencing while Shri Dilip Gulhane (PW-2) is purchaser of plot in the layout which is within boundaries as mentioned above. He has purchased the plot on 14/9/1996 by registered sale deed. In this background, when application of mind by lower appellate court is

looked into, it becomes clear that it has ignored registered sale deeds exhibit 27 and 28 merely because witnesses examined had no personal knowledge of the transaction. It has also held that none of the parties were in position to state exact property sold by deceased Govindrao and retained by him. It further held that deceased had retained about 1 acre portion with him while selling 2 acres to Shri Malu. The entire approach is therefore clearly erroneous. It has not recorded a finding that boundaries of property sold were in dispute in any way. It has also not considered the landlocked location of temple/well plot and need of 10 feet wide road as a approach to it from government road (Shegaon to Nawasari) located on southern side boundary. When the boundaries and sale are admitted by defendants, there was no need to disbelieve exhibit 30 because exact area of temple/well plot was not in dispute and for adjudication before it. The defendants did not raise any fencing around only temple/well plot but they encircled entire portion of 2 acres covered by sale deeds exhibit 27 and 28. The defendants did not contend that plaintiff has taken into possession more land than 2 acres

or 0.81 R. It is thus apparent that the lower appellate court has committed error in not properly evaluating the nature of controversy and this has resulted in an apparentely erroneous order.

9. Being the appeal court acting under section 96 CPC, it was necessary for it to evaluate the finding recorded by trial court and, if it wanted to reverse it, to also record reasons for taking different view. As already stated above the lower appellate court has not made any comment about admission of defendants about sale of 2 acres of land by deceased Govindrao, admission about boundaries mentioned in exhibit 27 and 28, need of 10 feet wide road on South North bund as a approach way to temple from Eastern side, etc. In fact, when boundaries of property sold were not in dispute, it is apparent that land covered within those four corners belonged to plaintiff and in view of nature of defence raised, the defendants could not have erected fencing to encircle the land sold by deceased Govindrao. The Lower Appellate Court has not approached the issue from right perspective. There is failure on its

part to exercise jurisdiction vested in it under section 96 CPC.

10. In the result, the Misc. C.A. No. 771 of 2006 for Review is allowed. The judgment dated 16/12/2005 is accordingly Reviewed. Appeal against Order (A.O.) 48/2002 is hereby dismissed. The Civil Application No. 7773/2002 filed by plaintiff in said A.O. is hereby allowed. The judgment on decree of lower appellate court dated 6/7/2002 in Regular Civil Appeal 163/1999 is quashed and set aside. The said Regular Civil Appeal is hereby dismissed and judgment and decree dated 7/7/1999 delivered by 8th Joint Civil Judge, Junior Division Amravati in Regular Civil Suit 91 of 1997 is hereby restored. No order as to costs.

JUDGE

Rgd.